[redacted]

Supreme Court of the [redacted]

October Term, [redacted]

No. 349

[redacted]

[redacted]

vs.

THE UNITED STATES OF [redacted]

[redacted]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 343

HAMBURG-AMERICAN LINE, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 21, 1933

[fols. a & 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

HAMBURG-AMERICAN LINE, Plaintiff,

against

THE UNITED STATES OF AMERICA, Defendant

STATEMENT UNDER RULE 13, PARAGRAPH 4

Action commenced by filing of petition on April 7, 1930.

There has been no change in the original parties.

Answer filed April 2, 1931.

Notice of motion for judgment on the pleadings served July 23, 1931.

Motion for judgment on the pleadings argued before Judge Coleman on August 4, 1931; judgment directed for plaintiff on the second and third causes of action and for the defendant as to the first cause of action.

Order for Judgment signed on August 13, 1931; entered on September 3, 1931.

Judgment entered September 17, 1931.

Appeal taken by plaintiff on the first cause of action on November 6, 1931.

[fol. 2] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

L. 47/112

HAMBURG-AMERICAN LINE, Plaintiff,

against

THE UNITED STATES OF AMERICA, Defendant

PETITION

Plaintiff, a corporation duly organized and existing under and pursuant to the laws of the Republic of Germany, and having a place of business and transacting business at #39 Broadway, New York, N. Y., which is within the limits of the District Court of the United States for the South-

ern District of New York, brings this petition and complaint against the United States, and thereupon plaintiff respectfully represents and alleges as follows;

For a First Cause of Action

1. That during all the times hereinafter mentioned, plaintiff was and still is a corporation duly organized under the laws of the Republic of Germany and engaged as a common carrier in the transportation of passengers for hire between European and other ports and seaports of the United States.

2. That the plaintiff was at all times hereinafter mentioned the owner of the S. S. "Deutschland".

[fol. 3] 3. That prior to the commencement of this action, and on or about October 22, 1928, plaintiff brought to the United States on the S. S. "Deutschland" at the port of New York, the alien, Philip O'Reilly, age 49, applying for admission to the United States as a returning resident, who was excluded from admission to the United States as is hereinafter set forth in greater detail.

4. That the said Philip O'Reilly was ordered excluded and deported by the inspection officers of the United States Immigration Service on the ground that he was a non quota immigrant not in possession of any immigration visa; that the plaintiff was subsequently advised by the Commissioner of Immigration at Ellis Island, N. Y., that the ascertained facts indicated that a fine of $1,000.00 should be imposed and a sum equal to that paid on account of the said alien for his passage from the initial point of departure to the point of arrival, to wit, $140.00, making a total of $1,140.00 thus sought to be imposed.

5. That plaintiff in accordance with the statute and regulations made thereunder duly filed a protest with the Secretary of Labor and submitted evidence to show why a fine should not be imposed.

6. The evidence submitted and the file and records of the Bureau of Immigration, Department of Labor, in the case of Philip O'Reilly establish the following facts:

(a) That the said Philip O'Reilly was born in and is a native of Ireland.

[fol. 4] (b) That the alien was a returning resident, having been out of the United States since June 18, 1928, and before presenting himself as a passenger upon the plaintiff's S. S. "Deutschland", presented a British passport issued at San Francisco, California, on June 1, 1928, and testified before a Board of Special Inquiry that he was a Catholic priest and was returning to rejoin his pastorate at Virginia City, Nevada, and had forgotten to obtain a return permit.

7. That the immigration law in effect at the time of the alien's arrival, as described in Section 10 (f) of the Immigration Act of 1924, says in effect that permits issued under this section shall have no effect under the immigration laws except to show that the alien to whom it is issued is returning from a temporary visit abroad, and there is nothing in the section which makes such permits the exclusive means of establishing that the alien is so returning. Furthermore, Section 13 (b) of the same Act says that immigrants who have been legally admitted to the United States and who depart temporarily may be admitted to the United States without being required to obtain any immigration visa.

8. That thereafter, notwithstanding that the said Philip O'Reilly was returning to the United States after a temporary visit abroad, and in fact was admitted by the Secretary of Labor, the plaintiff was notified that the Secretary of Labor had directed that a fine be imposed on the ground that the alien had been found to be a non-quota alien not in possession of any immigration visa or return permit. [fol. 5] A refund of passage money was not directed in view of the alien being unconditionally admitted to the United States.

9. That subsequently under protest and solely to avoid delay in or refusal of clearance of the said S. S. "Deutschland" the sum of $1,000.00 was paid to the Collector of Customs at the Port of New York, the duly authorized official on behalf of the United States to receive such amount, and that said money was had and received by the defendant.

10. That in transporting the said alien to the United States the plaintiff acted on the belief that he came within

the exceptions to the Immigration Act of 1924, being a returning resident.

11. That in transporting the said alien to the United States on the S. S. "Deutschland" the plaintiff did not violate any statute of the United States and did not become liable to any fine and that the act of the Secretary of Labor in imposing a fine was without authority and arbitrary, and the defendant, therefore, is without authority in law to retain said money.

12. That the imposition and exaction of a fine was unwarranted and unlawful and in direct conflict with the law in such cases made and provided, and the sum of $1,000.00 has never been repaid to the plaintiff, although demand has been made of the defendant, but payment has been refused.

For a Second Cause of Action

13. Plaintiff realleges paragraph "1" with the same force and effect as if the same was herein fully set forth, [fol. 6] and further complaining of the defendant alleges as follows:

14. That the plaintiff was at all times hereinafter mentioned the owner of the S. S. "Cleveland".

15. That prior to the commencement of this action, and on or about December 4, 1928, plaintiff brought to the United States on the S. S. "Cleveland" at the port of New York, the alien, Stefan Mijowitz, age 9, accompanied by his sister Julia, applying for admission to the United States, who was excluded from admission to the United States as is hereinafter set forth in greater detail.

16. That the said Stefan Mijowitz was ordered excluded and deported by the inspection officers of the United States Immigration Service on the ground that he was afflicted with a loathsome, contagious disease, to wit, ringworm of the scalp; that the plaintiff was subsequently advised by the Commissioner of Immigration at Ellis Island, N. Y., that the ascertained facts indicated that a fine of $1,000.00 should be imposed and a sum equal to that paid on account of the said alien for his passage from the initial point of departure to the point of arrival, to wit, $66.00, making a total of $1,066.00 thus sought to be imposed.

17. That plaintiff in accordance with the statute and regulations made thereunder duly filed a protest with the Secretary of Labor and submitted evidence to show why a fine should not be imposed.

[fol. 7] 18. The evidence submitted and the file and records of the Bureau of Immigration, Department of Labor, in the case of Stefan Mijowitz establish the following facts:

(a) That the said Stefan Mijowitz was born in and is a native of Roumania.

(b) That before presenting himself as a passenger upon the plaintiff's S. S. "Cleveland" the said alien exhibited a proper Roumanian passport together with a non-quota visa issued under the provisions of Section 4 (a) of the Act of 1924 by the American Vice-Consul at Bucharest, Roumania, it having been shown that the child was the son of a naturalized American citizen.

(c) That upon arrival at New York the said Stefan Mijowitz was examined by surgeons of the Public Health Service and certified to have ringworm of the scalp, a loathsome, contagious disease. The evidence shows that the alien was destined to his stepmother and father, the latter being a citizen of the United States.

19. That notwithstanding the certified condition of the applicant, he was a proper subject for consideration under the provisions of Section 22 of the Immigration Act of Feb. 5, 1917, which provides:

"That whenever an alien shall have been naturalized or shall have taken up his permanent residence in this country, and thereafter shall send for his wife or minor children to join him, and said wife or any of said minor [fol. 8] children shall be found to be affected with any contagious disorder, such wife or minor children shall be held, under such regulations as the Secretary of Labor shall prescribe, until it shall be determined whether the disorder will be easily curable or whether they can be permitted to land without danger to other persons; and they shall not be either admitted or deported until such facts have been ascertained; and if it shall be determined that the disorder is easily curable and the husband or father or other respon-

sible person is willing to bear the expense of the treatment, they may be accorded treatment in hospital until cured and then be admitted, or if it shall be determined that they can be permitted to land without danger to other persons, they may, if otherwise admissible, thereupon be admitted: Provided, That if the person sending for wife or minor children be naturalized, a wife to whom married or a minor child born subsequent to such husband or father's naturalization shall be admitted without detention for treatment in hospital, and with respect to a wife to whom married or a minor child born prior to such husband or father's naturalization the provisions of this section shall be observed, even though such person is unable to pay the expense of treatment, in which case the expense shall be paid from the appropriation for the enforcement of this act."

20. That thereafter, notwithstanding that under the provisions of Section 22 of the Immigration Act of February [fol. 9] 5, 1917, hospital treatment was accorded the said alien based on the fact that he was the child of an American citizen, and was subsequently cured and unconditionally admitted to the United States by the Secretary of Labor, the plaintiff was notified that the Secretary of Labor had directed that a fine be imposed on the ground that the alien was found to be afflicted with ringworm of the scalp. A refund of passage money was not directed in view of the alien being unconditionally admitted to the United States.

21. That subsequently under protest and solely to avoid delay in or refusal of clearance of the said S. S. "Cleveland" the sum of $1,000.00 was paid to the Collector of Customs at the Port of New York, the duly authorized official on behalf of the United States to receive such amount, and that said money was had and received by the defendant.

22. That in transporting the said alien to the United States the plaintiff acted on the belief that in any event he came within the exceptions to Section 22 of the Immigration Act of February 5, 1917, being the son of an American citizen.

23. That in transporting the said alien to the United States on the S. S. "Cleveland" the plaintiff did not vio-

late any statute of the United States and did not become liable to any fine and that the act of the Secretary of Labor in imposing a fine was without authority and arbitrary, and the defendant, therefore, is without authority in law to retain said money.

[fol. 10] 24. That the imposition and exaction of a fine was unwarranted and unlawful and in direct conflict with the law in such cases made and provided and the sum of $1,000.00 has never been repaid to the plaintiff, although demand has been made of the defendant, but payment has been refused.

For a Third Cause of Action

25. Plaintiff realleges paragraph "1" with the same force and effect as if the same was herein fully set forth, and further complaining of the defendant alleges as follows:

26. That the plaintiff was at all times hereinafter mentioned the owner of the S. S. "New York".

27. That prior to the commencement of this action, and on or about July 29, 1929, plaintiff brought to the United States on the S. S. "New York" at the port of New York, the alien, Regina Pasternak, age 9, accompanied by her mother, Dwojra Pasternak, applying for admission to the United States, who was excluded from admission to the United States as is hereinafter set forth in greater detail.

28. That the said Regina Pasternak was ordered excluded and deported by the inspection officers of the United States Immigration Service on the ground that she was afflicted with trachoma; that the plaintiff was subsequently advised by the Commissioner of Immigration at Ellis [fol. 11] Island, N. Y., that the ascertained facts indicated that a fine of $1,000.00 should be imposed and a sum equal to that paid on account of the said alien for her passage from the initial point of departure to the point of arrival, to wit, $64.00, plus the sum of $128.00 representing passage money for the accompanying alien, Dwojra Pasternak, making a total of $1,192.00 thus sought to be imposed.

29. That plaintiff in accordance with the statute and regulations made thereunder duly filed a protest with the

Secretary of Labor and submitted evidence to show why a fine should not be imposed.

30. The evidence submitted and the file and records of the Bureau of Immigration, Department of Labor, in the case of Regina Pasternak establish the following facts:

(a) That the said Regina Pasternak was born in and is a native of Austria.

(b) That before presenting herself as a passenger upon the plaintiff's S. S. "New York" the said alien through her mother exhibited a proper Austrian passport together with a nonquota visa issued under the provisions of Section 4 (a) of the Act of 1924 by the American Vice-Consul in Vienna, Austria, it having been shown that the child was the daughter of a naturalized American citizen.

(c) That upon arrival at New York the said Regina Pasternak was examined by surgeons of the Public Health [fol. 12] Service and certified to have trachoma. The evidence shows that the alien was destined to her father who was a citizen of the United States.

31. That notwithstanding the certified condition of the applicant, she was a proper subject for consideration under the provisions of Section 22 of the Immigration Act of February 5, 1917, which provides:

"That whenever an alien shall have been naturalized or shall have taken up his permanent residence in this country, and thereafter shall send for his wife or minor children to join him, and said wife or any of said minor children shall be found to be affected with any contagious disorder, such wife or minor children shall be held, under such regulations as the Secretary of Labor shall prescribe, until it shall be determined whether the disorder will be easily curable or whether they can be permitted to land without danger to other persons; and they shall not be either admitted or deported until such facts have been ascertained; and if it shall be determined that the disorder is easily curable and the husband or father or other responsible person is willing to bear the expense of the treatment, *they may be accorded treatment in hospital until cured and then be admitted,* or if it shall be determined that they can be permitted to land without danger to other persons, they

may, if otherwise admissible, thereupon be admitted: Provided, That if the person sending for wife or minor [fol. 13] children be naturalized, a wife to whom married or a minor child born subsequent to such husband or father's naturalization shall be admitted without detention for treatment in hospital, and with respect to a wife to whom married or a minor child born prior to such husband or father's naturalization the provisions of this section shall be observed, even though such person is unable to pay the expense of treatment, in which case the expense shall be paid from the appropriation for the enforcement of this act."

32. That thereafter, notwithstanding that under the provisions of Section 22 of the Immigration Act of Feb. 5, 1917, hospital treatment was accorded the said alien based on the fact that she was the child of an American citizen, and was subsequently cured and unconditionally admitted to the United States by the Secretary of Labor, the plaintiff was notified that the Secretary of Labor had directed that a fine be imposed on the ground that the alien was found to be afflicted with trachoma. A refund of passage money was not directed in view of the alien being unconditionally admitted to the United States.

33. That subsequently under protest and solely to avoid delay in or refusal of clearance of the said S. S. "New York" the sum of $1,000.00 was paid to the Collector of Customs at the Port of New York, the duly authorized official on behalf of the United States to receive such amount, and that said money was had and received by the defendant.

[fol. 14] 34. That in transporting the said alien to the United States the plaintiff acted on the belief that in any event she came within the exceptions to Section 22 of the Immigration Act of February 5, 1917, being the daughter of an American citizen.

35. That in transporting the said alien to the United States on the S. S. "New York" the plaintiff did not violate any statute of the United States and did not become liable to any fine and that the act of the Secretary of Labor in imposing a fine was without authority and arbitrary, and the defendant therefore is without authority in law to retain said money.

36. That the imposition and exaction of a fine was unwarranted and unlawful and in direct conflict with the law in such cases made and provided, and the sum of $1,000.00 has never been repaid to the plaintiff, although demand has been made of the defendant, but payment has been refused.

Wherefore plaintiff demands judgment against the defendant in the sum of $3,000.00 together with the costs and disbursements of this action and lawful interest, if any.

John M. Lyons, Attorney for Plaintiff. Office & P. O. address: 27 William Street, Borough of Manhattan, New York City.

[fol. 15] *Duly sworn to by John Pannes. Jurat omitted in printing.*

[fol. 16] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER

The defendant above named by George Z. Medalie, United States Attorney for the Southern District of New York, its attorney, for its answer to the petition herein, upon information and belief.

As to the First Cause of Action

1. Denies each and every allegation contained in paragraphs numbered and designated as "7", "11", and "12" of the petition.

2. Denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegations contained in the paragraph numbered and designated as "10" of the petition.

For a First, Separate and Distinct Defense to the First Cause of Action

3. Alleges that the plaintiff was under a legal duty to take reasonable steps to ascertain the admissibility of the [fol. 17] alien before transporting him to the United States;

the petition does not allege that any precautions were taken; and the records of the Department of Labor, Bureau of Immigration, show that the plaintiff was negligent in accepting the alien at the foreign port of embarkation for transportation to the United States since his inadmissibility was apparent.

As to the Second Cause of Action

4. Denies each and every allegation contained in paragraph numbered and designated "19" of the petition, except the quotation of Section 22 of the Immigration Act of February 5, 1917, therein.

5. Denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegation contained in the paragraph numbered and designated as "22" of the petition.

6. Denies each and every allegation contained in paragraphs numbered and designated "23" and "24" of the petition.

For a First, Separate and Distinct Defense to the Second Cause of Action

7. Alleges that the plaintiff was under a legal duty to take reasonable steps to ascertain the admissibility of the alien before transporting him to the United States; the [fol. 18] petition does not allege that any precautions were taken; and the records of the Department of Labor, Bureau of Immigration, show that the plaintiff was negligent in accepting the alien at the foreign port of embarkation for transportation to the United States since his inadmissibility was apparent.

As to the Third Cause of Action

8. Denies each and every allegation contained in paragraph numbered and designated "31" of the petition, except the quotation of Section 22 of the Immigration Act of February 5, 1917, therein.

9. Denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegation contined in the paragraph numbered and designated as "34" of the petition.

10. Denies each and every allegation contained in paragraphs numbered and designated as "35" and "36" of the petition.

For a First, Separate and Distinct Defense to the Third Cause of Action

11. Alleges that the plaintiff was under a legal duty to take reasonable steps to ascertain the admissibility of the alien before transporting her to the United States; the petition does not allege that any precautions were taken; and the records of the Department of Labor, Bureau of Immigration, show that the plaintiff was negligent in accepting the alien at the foreign port of embarkation for [fol. 19] transportation to the United States since her inadmissibility was apparent.

Wherefore the defendant demands judgment dismissing the petition, together with the costs and disbursements of this action.

George Z. Medalie, United States Attorney for the Southern District of New York, Attorney for the Defendant. Office & P. O. address: U. S. Courts & P. O. Building, Borough of Manhattan, City of New York.

Duly sworn to by Frank W. Ford. Jurat omitted in printing.

[fol. 20] IN UNITED STATES DISTRICT COURT

[Title omitted]

PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS

SIR: Please take notice that upon the pleadings and proceedings heretofore had in this action, the undersigned will [fol. 21] make a motion before the District Court of the United States for the Southern District of New York, at the motion part of said Court, Room 235, Old Post Office Building, Borough of Manhattan, City of New York, on the 28th day of July, 1931, at 10:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for judgment on the pleadings, and that judgment be entered

as prayed for in the complaint, and for such other and further relief as to the court may seem just and proper.

Dated New York, N. Y., July 23, 1931.

Yours, etc., John M. Lyons, Attorney for Plaintiff. Office & P. O. address: 27 William Street, Borough of Manhattan, New York City.

To George Z. Medalie, Esq., United States Attorney, Attorney for Defendant.

[fol. 22] IN UNITED STATES DISTRICT COURT

[Title omitted]

MEMO., COLEMAN, D. J., ENDORSED ON NOTICE OF MOTION

Motion granted to extent of directing judgment for plaintiff on the second and third causes of action re decisions of Judge Patterson and Judge Bondy in Lloyd, etc. v. Elting, 45 Fed. (2) 405 and Cosulich, etc. v. Elting (unreported) are conceded by both sides to be controlling on this motion.

August 4, 1931.

Frank J. Coleman, U. S. D. J.

[fol. 23] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER FOR JUDGMENT—Aug. 13, 1931

Plaintiff having moved this court for judgment on the pleadings, and said motion having duly come on to be heard by this court on the 4th day of August, 1931, and after hearing John M. Lyons, attorney for the plaintiff in support of said motion, and Frank Chambers, Assistant United States Attorney in opposition thereto, and due deliberation having been had thereon, Now, on motion of John M. Lyons, attorney for the plaintiff, it is

Ordered that the motion be and the same hereby is granted as to the second and third causes of action and that the plaintiff have judgment thereon in the sum of $2,000 plus costs as taxed, and it is further

[fol. 24] Ordered that the motion be and the same hereby is denied as to the first cause of action and that the defendant have judgment dismissing the said cause of action, and it is further

Ordered that the clerk of this court be directed to enter judgment in accordance with this order.

Frank J. Coleman, U. S. D. J.

(Filed 9/3/31.)

In United States District Court, Southern District of New York

L. 47/112

Hamburg-American Line, Plaintiff,

against

The United States of America, Defendant

Judgment

The plaintiff having moved for judgment on the pleadings and an order having been thereafter entered on the 3rd day of September, 1931, granting the motion in favor of the plaintiff as to the second and third causes of action and directing the entry of judgment in the sum of $2,000.00 plus costs as taxed, and dismissing the complaint as to the first cause of action, Now, on motion of John M. Lyons, Esq., attorney for the plaintiff, it is hereby

[fol. 25] Ordered and Adjudged that the plaintiff herein have judgment in the sum of $2,000.00 plus costs in the sum of $5.00, making a total of $2,005.00, and that the defendant have judgment dismissing the first cause of action.

Dated New York, N. Y., September 17, 1931.

Charles Weiser, Clerk.

In United States District Court

[Title omitted]

Assignment of Errors

Now comes the plaintiff by John M. Lyons, its attorney herein, and says that the District Court of the United

States for the Southern District of New York in rendering the judgment herein, dated September 17, 1931, in favor of the defendant and against the plaintiff, erred in the following respects, to wit:

First. That the court erred in dismissing the first cause of action in the complaint herein and in directing judgment for the defendant.

[fol. 26] Second. That the court erred in holding that the plaintiff was subject to a fine of $1,000.00 for bringing to the United States a non-quota alien who was subsequently admitted by the Secretary of Labor.

Third. That the court erred in holding that a penalty in the amount of $1,000.00 was incurred by plaintiff on account of an alien granted unconditional admission by the Secretary of Labor.

Fourth. That the court erred in holding that the $41,000.00 penalty and the amount of the passage money, which was refunded, was not an invisible penalty.

Fifth. That the court erred in holding that the Secretary of Labor acted within his lawful authority in imposing such a penalty.

Sixth. That the court erred in refusing to hold that the Secretary of Labor acted arbitrarily or unlawfully in imposing such fine which plaintiff seeks to recover.

Wherefore the plaintiff prays that the judgment herein in favor of the defendant may be reversed and held for naught and that the said plaintiff may be restored to all things which it has lost by reason of the said judgment.

Dated New York, N. Y., November 6, 1931.

John M. Lyons, Attorney for Plaintiff. Office & P. O. address: 27 William Street, Borough of Manhattan, New York City.

Filed, 12/1/31.

[fol. 27] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL

Now comes the plaintiff, Hamburg-American Line, and says that on the 17th day of September, 1931, the Court

entered judgment herein dismissing the complaint as to the first cause of action and that by the said judgment certain errors were committed to the prejudice of the plaintiff, all of which will more fully appear in the assignment of errors filed with this petition.

Wherefore the plaintiff prays that an appeal from the said judgment to the Circuit Court of Appeals for the Second Circuit for the correction of the errors so complained of and for the allowance of the said appeal and for leave to prosecute the same and that a transcript of the record and the proceedings in this cause duly authenticated be forwarded to the said Circuit Court of Appeals.

Dated New York, N. Y., November 6, 1931.

John M. Lyons, Attorney for Plaintiff. Office & P. O. address: 27 William Street, Borough of Manhattan, New York City.

[fol. 28] IN UNITED STATES DISTRICT COURT

ALLOWANCE OF APPEAL

The above appeal is hereby allowed.

Dated New York, N. Y., November 6, 1931.

Frank J. Coleman, U. S. D. J.

Citation, in usual form, omitted in printing.

[fol. 29] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO RECORD

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the foregoing is a true copy of the transcript of the record of the said District Court in the above-entitled matter, as agreed upon by the parties.

Dated New York, N. Y., January —, 1933.

John M. Lyons, Attorney for Plaintiff. George Z. Medalie, United States Attorney, Attorney for Defendant.

[fol. 30] Clerk's certificate to foregoing transcript omitted in printing.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1932

No. 350

Argued April 6, 1933. Decided May 8, 1933

HAMBURG-AMERICAN LINE, Appellant,

v.

THE UNITED STATES OF AMERICA, Respondent

Appeal from the District Court of the United States for the Southern District of New York

Before Manton, L. Hand, and Chase, Circuit Judges

Appeal by the plaintiff from a judgment of the District Court for the Southern District of New York; dismissing a complaint at law for money had and received.

Roger O'Donnell, of Washington, D. C., for appellant.
Frank Chambers, of New York City, for appellee.

L. HAND, Circuit Judge:

The plaintiff sued under the Tucker Act (24 Stat. 505) to recover for money paid to discharge a fine levied by the Secretary of Labor as a penalty for bringing in an alien without visa under section 16 (a) of the Quota Act of 1924 (8 U. S. C. A. § 216 (a)). The complaint alleged that the plaintiff was a common carrier—the owner of a line of steamers—which had in 1928 brought to the port of New York one, O'Reilly, an alien, who applied for admission as a returning resident, and was excluded as an immigrant without visa. The Commissioner of Immigration thereupon fined it $1,000, together with $140 return passage money. O'Reilly was a native Irishman, who had acquired a residence in the United States, had left in June, 1928, and was coming back. He had failed to get a return permit as provided for in section 10 of the Quota Act (8 U. S. C. A. § 210), but he was eventually admitted, though for what reason does not appear. Thereafter the Secretary of Labor imposed a fine of $1,000, remitting the passage money. The plaintiff

paid under protest and the action was in part to recover the fine; there were other causes of action not here relevant. The defendant answered without material denials, and alleged as a defense that the plaintiff had been negligent in inquiring as to the status of the alien, whose inadmissibility was apparent. The court dismissed the complaint on the pleadings, and the plaintiff appealed.

The question presented is whether a carrier is liable to a fine under section 16 of the Quota Act of 1924 for bringing an alien to the United States who has been admitted in the past, has acquired a residence, has left on a temporary visit without procuring a permit, comes back without a visa, and is eventually admitted a second time. Section 16 (a) broadly provides that it shall be an offence to bring in any alien without a visa; no exception is made as to those who may be admissible under section 13 (a), of the Act (8 U. S. C. A. § 213 (b)). It is just possible that Congress intended to fine carriers who brought in aliens who had no visa, even though armed with a satisfactory permit. That, we must own, would be an extreme penalty, but section 16 (b), of the act (8 U. S. C. A. § 216 (b)), gives the Secretary a discretion, and it may have been intended to put a carrier to the hazard that the permit would be rejected, especially as it may not be conclusive of the fact, section 10 (f) of the act (8 U. S. C. A. § 210 (f)). The final decision must be made in this country, and perhaps the carrier's opportunity under section 16 (c) of the act (8 U. S. C. A. § 216 (c)) to secure remission of the fine on the ground that he had made all reasonable inquiry in advance, was thought enough. Elting v. North German Lloyd, 287 U. S. 324, 53 S. Ct. 164, 77 L. Ed. —. The contrary was ruled in Rederiaktie-bolaget, etc., v. U. S., 61 F. (2d) 808 (C. C. A. 9), where indeed the court appears to have gone further by way of dictum, and to have held that returning aliens were not within section 16 at all. It would follow that the section would not even cover a case where they were excluded. To that we cannot agree. However, for argument we will assume that the statute does not apply when they have satisfactory permits, reserving the point; but it does not seem to us consonant either with the letter, or the intendment of the law, to say that when they have neither a visa, nor a satisfactory permit, it is lawful to bring them here. If an exception is to be made to the language of sec-

tion 16, it must be at least so confined as to preserve its purpose.

The plaintiff argues that, however that may be, as O'Reilly was finally admitted, the fine could not accrue in any event. From this position two separate questions arise: First, whether the Secretary had power in his discretion to admit O'Reilly at all; second, whether if he did, he could fine the plaintiff. As to the first; section 10 provides for the issue of a permit, and subdivision (f), that the section as a whole shall not make the permit the only evidence that the alien is returning from a sojourn. However, section 10 does not profess to declare what is the effect of having a permit, or of having none; it is section 13 (b) which alone authorizes the admission of "immigrants" without visa. Subdivision (a), § 13 (8 U. S. C. A. § 213 (a)), requires a visa of all, and would be peremptory against those returning from a sojourn, were it not that subdivision (b) exempts from the class so excluded those who have lived here, and are coming back from a visit; but in that case only as may be provided by regulation. The whole situation then is this; all "immigrants" must produce visas except those of O'Reilly's class; they may be admitted only according to regulation, and they may get permits which section 10 does not make the only competent evidence. What other evidence shall be competent, and how far permits shall be evidence, therefore depend upon the regulations.

The pertinent regulations are Rule 3, subdivision F, paragraphs 1 and 3, and subdivision I, paragraph 2. Paragraph 1 of subdivision F excepts those who have permits from the class of whom visas are required; it implies that those who have neither visa nor permit shall not be admitted. This is confirmed by paragraph 3, which further extends the class of admissibles to those whose permits may have expired en route. Paragraph 2 of subdivision I makes the permit only prima facie evidence, and requires the alien generally to satisfy the officials. Thus the regulations as a whole require a permit of all aliens in O'Reilly's class, though, in the limited case of paragraph 3 of subdivision F, it may have expired. But there seems to be no doubt that returning aliens must have either visa or permit of some kind. All this is in "implementation" by regulation of the privilege given by section 13 (b).

Although subdivision (d) of section 13 (8 U. S. C. A. § 213 (d)) gives a limited discretion to the Secretary, this does not extend to subdivision (b), as to which he must proceed according to the regulations made under section 24 (8 U. S. C. A. § 222), by the Commissioner General with his approval. A strong argument might therefore be made that he has no more power to admit an alien in the face of the regulations than if the statute itself forbade. Regulations have the force of law; they require the assent of both officials; they are published; they are in general terms. The Secretary, it may be urged, no more than any one else, may lawfully dispense with them in the exercise of a personal discretion, such as in other cases the statute expressly allows him. If so, O'Reilly was not lawfully admitted, and the question would not arise as to what would be the result if he had been, as for example, under section 13 (d). Whatever the unfairness of enforcing the law against the carrier in spite of its violation in the alien's favor, we could not interfere.

But it is not necessary so to hold, for though he was lawfully admitted, nevertheless the fine was due. Subdivision (f) of section 13 (8 U. S. C. A. § 213 (f)) provides that nothing in the section at large shall effect a remission of any fine "accrued under section 16." The only remission which the section could effect would be in case of the Secretary's discretionary interposition to admit. If it be supposed that under subdivision (b) the Secretary has discretionary power to admit an alien of O'Reilly's class, who does not comply with the regulations, at least the exercise of that discretion cannot go further than if the Secretary had admitted him under subdivision (d). The fine incurred by virtue of section 16 would still stand; subdivision (f) so provides. Thus our decisions are inapplicable, which have intimated, if they did not decide, that in other situations the admission of the alien tolls the fine. Norddeutscher Lloyd v. U. S., 213 F. 10 (C. C. A. 2); Compagnie Generale, etc., v. U. S., 51 F. (2d) 1053 (C. C. A. 2); Lloyd Sabaudo Societa v. Elting, 55 F. (2d) 1048 (C. C. A. 2). That may well be true when the statute does not say otherwise, but not here.

Furthermore, subdivision (f) answers the argument, sometimes put forward, that the fine, which is made up of the return passage money and a penal sum, is indivisible.

Compagnie G., etc., v. U. S., supra; Lloyd Sabaudo Societa v. Elting, supra. Compare Norddeutscher Lloyd v. U. S., supra. Since the subdivision necessarily contemplates a case where the alien is admitted, and declares that the fine shall not then abate, we must choose whether to impose both items, or only the penal sum. As it is incredible that Congress should have intended to impose the return passage money when the alien stopped here, we choose the alternative. Thus, even though we are to assume that section 16 does not cover the importation of aliens who are admitted under a permit, the fine was proper. If the Secretary had no power to admit O'Reilly, his mistake could not relieve the plaintiff. If on the other hand he had a dispensatory power over the regulations, nevertheless it had no greater effect than his power to admit under section 13 (d). Section 13 (f) preserves the fine against any discretionary admission. That the Secretary properly used his discretion under section 16 (b) is apparent; it was easy for the plaintiff to learn whether O'Reilly had a permit. We cannot disguise our doubts as to the correctness of this path through the labyrinth which it has pleased Congress to set up. The maze of verbiage from which we are to extract a consistent intent, is beyond measure baffling; certainly must await an authoritative ruling, but, as best we can grope our way, we are content to follow the learned District Judge.

Judgment affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the court-rooms, in the Post Office building, in the City of New York, on the 15th day of May, one thousand nine hundred and thirty-three.

Present: Hon. Martin T. Manton, Hon. Learned Hand, Hon. Harrie B. Chase, Circuit Judges.

HAMBURG-AMERICAN LINE, Plaintiff-Appellant,

vs.

UNITED STATES, Defendant-Appellee

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be, and it hereby is, affirmed.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[Endorsed:] United States Circuit Court of Appeals, Second Circuit. Hamburg-American Line vs. United States. Order for mandate. United States Circuit Court of Appeals, Second Circuit. Filed May 15, 1933. William Parkin, Clerk.

UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 35, inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the case of Hamburg-American Line, plaintiff-appellant, against United States, defendant-appellee, as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 20th day of July, in the year of our Lord one thousand nine hundred and thirty-three, and of the Independence of the said United States the one hundred and fifty-eighth.

Wm. Parkin, Clerk. (United States Circuit Court of Appeals, Second Circuit.)

[fol. 37] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 9, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 37,946. U. S. Circuit Court of Appeals, Second Circuit. Term No. 343. Hamburg-American Line, petitioner, vs. The United States of America. Petition for a writ of certiorari and exhibit thereto. Filed August 14, 1933. File No. 343, O. T., 1933.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 343

HAMBURG-AMERICAN LINE, PETITIONER,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

ROGER O'DONNELL,
Counsel for Petitioner.

WILLIAM J. PETERS,
LAMBERT O'DONNELL,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 343

HAMBURG-AMERICAN LINE, PETITIONER,

vs.

THE UNITED SATES OF AMERICA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

MAY IT PLEASE THE COURT:

The petition of the Hamburg-American Line respectfully shows to this Honorable Court:

The Essential Facts.

1. This is a suit which was originally brought in the United States District Court for the Southern District of New York, under the so-called Tucker Act, 28 U. S. C. A., Sec. 4 (20), to recover from the United States Government a fine of $1,000 unlawfully assessed and collected by said Government through the Collector of Customs for the port of New York. Such suit arose out of the following facts:

2. Philip O'Reilly, an alien, native of Ireland and a clergyman by profession, who had resided in the United States continuously for a period of twenty years, was, after a temporary absence of four months, brought to the port of New York as a passenger upon one of petitioner's vessels, to resume his residence in the United States. He was at first ordered excluded by the immigration authorities as a non-quota immigrant without an immigration visa, but was unconditionally admitted to the United States as a returning alien resident, by order of the Secretary of Labor, acting under the authority of Section 13 (*b*) of the Immigration Act of 1924, 8 U. S. C. A., Sec. 213.

3. After the returning alien had been so admitted, the Collector of Customs for the port of New York, acting under orders of the Secretary of Labor, assessed and collected a fine of $1,140.00, in purported conformity with section 16 of the Immigration Act of 1924, 8 U. S. C. A., Sec. 216. Upon due protest being made, $140.00 was ordered returned to the petitioner, but $1,000 was imposed as a penalty and paid over to the said Collector of Customs.

4. Thereafter this suit was brought (R. 4) and upon motion for judgment on the pleadings (R. 20) such motion was, as to this cause of action, denied (R. 22) and judgment was entered accordingly dismissing this complaint (R. 23).

5. The Circuit Court of Appeals for the Second Circuit affirmed the decision of the district court, for reasons as set forth in an opinion by L. Hand, Circuit Judge (R. 31), which is reported in 65 Fed. 2d, at page 369 (advance sheets).

Reasons for Granting the Petition.

6. The decision below creates a direct conflict with the Circuit Court of Appeals for the Ninth Circuit, as set forth

in the case of *Rederiaktiebolaget Nordstjernen* v. *United States*, 61 Fed. 2d, 808 (generally called the "Johnson Line case" to facilitate pronunciation). In that instance the facts are substantially identical with the one now presented, involving an alien who had resided in the United States for many years and was transported to an American port as a returning alien resident returning from a temporary visit abroad, but without an immigration visa. She was at first excluded and later admitted by the Secretary of Labor precisely as in the O'Reilly case and upon the same authority. A fine of $1,000 was imposed in the same manner and the trial court dismissed the complaint, but the order of dismissal was reversed by the Circuit Court of Appeals for the Ninth Circuit in an elaborate opinion by Wilbur, Circuit Judge, cited *supra*. The Circuit Court of Appeals for the Second Circuit had before it the decision in the Johnson Line case, expressed disagreement therewith on one point (R. 32) and, after discussing the involved language of the statute and apparent uncertainty of the statutory intent, stated (R. 35) "certainty must await an authoritative ruling". This unquestionably suggests that a ruling should be sought and obtained which will be authoritative and binding in each of the respective circuits. The petitioner therefore invokes Rule 38, Section 5, of the Rules of this Honorable Court, and suggests that the conflict of decision as hereinbefore set forth is sufficient to justify the granting of this petition.

Jurisdiction.

7. The order on mandate below was entered on May 15, 1933 (R. 36).

8. Jurisdiction of this Court is provided by 28 U. S. C., Sec. 347 (*a*).

Statutes Involved.

9. The statute involved is the Immigration Act of 1924 (8 U. S. C., Sec. 145). The particular parts of that statute having a bearing upon this case are Sections 13 (*b*) (*d*) and (*f*) and Section 16 (*a*) (*b*) and (*c*), which are set forth in the appendix hereof.

Questions Presented.

10. Whether a transportation line is justified in bringing to an American port as an applicant for readmission an alien resident of the United States who is returning from a temporary visit abroad, but had no immigration visa or re-entry permit.

11. Whether, under such circumstances, if the Secretary of Labor orders the admission of such returning resident alien, pursuant to discretionary authority conferred upon him by statute, such admission relieves the transportation line from penalization for having embarked and transported such passenger without an immigration visa.

12. Whether the fine and passage money constitute one indivisible penalty and whether it is within the statutory powers of the Secretary of Labor to separate them into two parts, refunding a part to the transportation line and imposing a fine of $1,000 as a separate penalty.

13. Whether liability to a fine accrues under Section 16 of the Immigration Act of 1924 in those cases wherein discretionary power is conferred upon the Secretary of Labor to admit a returning resident alien without an immigration visa and the secretary has exercised the power by readmitting such returning resident.

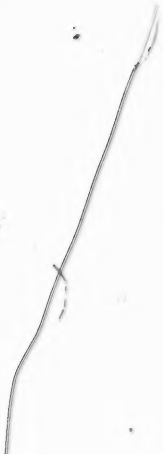
14. Whether the provisions of Section 13 (*f*) of the Immigration Act of 1924 establish any different principle

than that existing under former statutes containing substantially similar provisions for administrative fines in immigration cases.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Second Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 350, *Hamburg-American Line, Appellant,* v. *The United States of America, Respondent,* and that the said judgment of the Circuit Court of Appeals for the Second Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

HAMBURG-AMERICAN LINE,
By ROGER O'DONNELL,
Counsel for Petitioner.

WILLIAM J. PETERS,
LAMBERT O'DONNELL,
Of Counsel.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 343

HAMBURG-AMERICAN LINE, PETITIONER,

v.

THE UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinions of the Courts Below.

The opinion in the United States Circuit Court of Appeals for the Second Circuit is reported in *Hamburg-American Line* v. *United States,* 65 Fed. 2d, 369, and is printed in the record herein (R. 31).

The contrary opinion of the Circuit Court of Appeals for the Ninth Circuit is reported in *Rederiaktiebolaget Nordstjernen* v. *United States,* 61 Fed. 2d, 808.

II.

Jurisdiction.

1. The order on mandate below was entered on May 15, 1933 (R. 36).

2. Jurisdiction of this Court is provided by 28 U. S. C., sec. 347 (*a*), and is supported by the action of this Honorable Court in hearing and determining the cases of *Lloyd Sabaudo Societa Anonima Per Azioni* v. *Philip Elting, Collector, etc.* (287 U. S. 329; 53 S. Ct. —; 77 L. Ed. 184), and *Philip Elting* v. *North German Lloyd* (287 U. S. 324; 53 S. Ct. 164; 77 L. Ed. 181), involving interpretation of the Immigration Act of 1924, 8 U. S. C. A. sec. 213.

III.

Statement of the Facts.

The essential facts have been set out in the petition to which this is appurtenant (*supra*, p. 1) and in the interest of brevity are not repeated at this point.

IV.

Specification of Errors.

A. The Circuit Court of Appeals for the Second Circuit erred in finding and holding that the petitioner was subject to a fine of $1,000 for bringing back to the United States a resident alien who was found admissible and was admitted by the Secretary of Labor.

B. The Circuit Court of Appeals for the Second Circuit erred in finding and holding that the admission of the returning alien by the Secretary of Labor, as authorized by statute, had no effect upon the liability to penalty for transporting such alien.

C. The Circuit Court of Appeals for the Second Circuit erred in finding and holding that the fine and passage money, by statute made one penalty, is divisible by refunding a part and imposing a part.

D. The Circuit Court of Appeals for the Second Circuit erred in finding and holding that the fine accrued against the petitioner even if the Secretary of Labor authorized the admission of the alien regardless of his having no visa or re-entry permit.

E. The Circuit Court of Appeals for the Second Circuit erred in finding and holding that Section 13 (*f*) of the Immigration Act of 1924 established a different principle than that existing under former statutes providing for similar fines in substantially the same language as that of Section 16 of the Immigration Act of 1924.

F. The Circuit Court of Appeals for the Second Circuit erred in finding and holding that the Secretary of Labor had not acted arbitrarily and unlawfully in imposing the fine which the petitioner seeks to recover.

G. The petition for a writ of certiorari should be granted.

V.

ARGUMENT.

Point A. The petitioner was not subject to penalization for bringing back to the United States a resident alien who was found admissible and was admitted by the Secretary of Labor.

A returning resident alien, unlike all others, is by the very terms of the statute accorded preferential rights. Under the terms of Section 4 (*b*) of the Immigration Act of 1924 he is entitled to obtain a non-quota immigration visa to establish the fact that he is not subject to the provisions of the statute limiting the number of aliens who may be admitted within any one year. Secondly, such an alien may, at his election, pursuant to the provisions of Section 10 of the Act, apply for and receive a re-entry per-

mit which is by regulation made the substantial equivalent of a non-quota visa. Thirdly, such an alien, having neither non-quota visa or re-entry permit, may invoke the discretionary power of the Secretary of Labor, which cannot be exercised unless or until the alien applicant presents himself within the jurisdiction of the Secretary, namely, at a port of entry to the United States. These statutory innovations in favor of regularly-admitted and lawfully-domiciled aliens obviously place them in a specially favored class. It ought not to follow that such a returning resident alien, if unprovided with a re-entry permit and prevented by want of time or other reasons from obtaining a non-quota visa, shall be refused passage to the United States and left stranded in a foreign land; on the contrary, Section 13 (*b*) of the Immigration Act of 1924 provides a third and sanguinary means by which he may be admitted—by the express order of the Secretary of Labor, after arrival at an American port. In the case at bar, the Secretary of Labor found as a fact that the alien Philip O'Reilly was a lawfully resident alien, returning from a temporary visit abroad, and that the discretion conferred by statute should properly be exercised by admitting him as a non-quota immigrant.

The discretion conferred by Section 13 (*b*) of the Immigration Act of 1924 is substantially no different than that conferred by the 7th proviso to Section 3 of the Immigration Act of 1917 (8 U. S. C. A., Sec. 136) which authorizes the Secretary of Labor, in his discretion, to admit aliens returning, after a temporary absence, to an unreliquished United States domicile of seven consecutive years, under such conditions as he may prescribe.

In *Dollar Line* v. *Hyde* (23 Fed. 2d, 910) an alien resident of 18 years standing, returning from a three months' visit abroad, was found upon arrival to be afflicted with leprosy and was excluded and deported because of such affliction.

The Circuit Court of Appeals for the Ninth Circuit held that the steamship line which transported the alien resident to this country was not subject to the statutory fine of $1,000 for transporting such alien, and concluded (p. 912):

> "What action the Secretary would probably take in the case of a domiciled alien afflicted with a contagious disease is an immaterial consideration; we are concerned only with the extent of his power, and not with the considerations which may weigh with him in the exercise of his discretion. It would seem to follow that if the Secretary has such power, the alien must be permitted to invoke the exercise thereof by presenting himself at a port of entry, and hence a carrier cannot be penalized for transporting him for that purpose."

If such is the rule with respect to a dangerously diseased alien, whose very presence is a dangerous thing to all with whom he may come in contact, much more should be conceded as to the justification of a common carrier in transporting to these shores an alien passenger entitled to admission at the discretion of the Secretary of Labor, and whose *prima facie* right to entry could be no better evidenced than by the possession of a scrap of paper. It should be remembered that neither the non-quota visa or re-entry permit does anything more than indicate *prima facie* that the holder is not chargeable to some alien quota; the right of any alien to admission cannot be established until such alien has appeared at a port of entry in the United States. Hence the Secretary of Labor, in exercising his discretion by admitting Philip O'Reilly as a returning alien resident, established the *prima facie* right and conclusive right of the alien to admission, at one and the same time. It is submitted that the petitioner incurred no penalty by bringing the alien within the jurisdiction of the Secretary of Labor, and that the action of the Secretary, in finding him admissible

and admitting him, merely confirmed the right which existed at the time the alien was embarked as a passenger at a European port.

Point B. The admission of the returning alien by the Secretary of Labor, as authorized by statute, affected the liability of the petitioner to penalization for transporting such alien without an immigration visa or re-entry permit.

The fundamental purpose of the fine provisions of the immigration laws is the prevention of bringing to ports of the United States excludable aliens who are actually excluded and deported, with attendant hardships.

In the earlier enactments as far back as 1903 the fine provisions of the immigration laws only applied to mentally afflicted aliens and certain diseased classes whose presence on board ships endangered the health of other passengers. In 1917 these provisions were extended to cover minor physical defects, natives of certain geographical zones, and illiterate persons. In Senate Committee Report No. 352, 64th Congress, 1st Session, the object of the fine provisions and the mischief aimed at was summed up in these words:

> "The palpable object of these provisions is to prevent the hardships and other evils which result from transportation companies selling tickets to aliens who cannot enter the United States."

In other words, the purpose of penalizing a transportation line was to prevent embarkation of *inadmissible* aliens, upon whom hardship is inflicted because of exclusion and deportation. At the same time was added the provision making the fixed amount of the fine include a sum representing the price paid for the transportation, which was to be refunded to the deported alien; the purpose of this provision was obviously to alleviate the hardships of deporta-

tion by refunding money paid by an alien ordered excluded, just as the purpose of the penalty as an entirety is to discourage the transportation of aliens who are inadmissible. The alien Philip O'Reilly, in the case at bar, was not inadmissible, as he was entitled to invoke the discretionary powers of the Secretary of Labor, which could only be exercised at the port of arrival after the fact of transportation had been concluded, and such discretion *was* exercised—not by finding him inadmissible, but as being a person legally entitled to readmission as an alien resident of the United States returning from a temporary visit abroad.

When the bill which became the Immigration Act of 1924 was reported to the House of Representatives, the Committee Report (House Report No. 350, 68th Congress, 1st Session) clearly stipulated that the measure was intended to continue the principles laid down in the then-existing law. It stated:

> "The bill preserves the basic immigration law of 1917 * * * ; provides for preliminary examinations overseas * * * carries numerous sections to lessen hardships of immigrants."

The objective thus laid down undoubtedly referred to the provisions tending to relieve the hardships of deportation after useless and fruitless trips across the ocean.

A significant fact in the case at bar is that the Secretary of Labor, while inflicting a portion ($1,000) of the penalty prescribed in the statute, refunded to the petitioner the amount of the passage money ($140), thus evidencing that the alien had been properly transported and the value of the transportation earned by the petitioner. This shows that the hardship of deportation did not occur and that the fundamental purpose of preventing such hardships had not been infringed.

Point C. The fine and passage money are by statute one indivisible penalty and cannot be divided by executive authority in refunding a part and imposing a part.

Where an alien has been admitted in the discretion of the Secretary of Labor, and passage money has been returned to the steamship company, how can it be said that a fine has accrued? The fine and passage money are inseparable. One is tied to the other.

On this proposition Judge McCormick in the unreported case of *International Mercantile Marine* v. *United States* (L. 39/283, Southern District of New York) had this to say:

> "The penalty of fine in each case consisted of $200 and the passage money. These items constituted in the law but one unified, inseparable and individual penalty. Passage money was to be used for the benefit of the alien in the event he was excluded. None of these aliens were excluded but on the contrary all were given temporary admission into the United States, and as far as the records disclose they are still lawfully within the United States."

In *Norddeutscher Lloyd* v. *United States,* 213 Fed. 10, the Circuit Court of Appeals for the Second Circuit had under consideration a provision of the former Immigration Act of 1907 (34 Stat. 898), authorizing the assessment of fines in the cases of "aliens brought to this country in violation of law"; and the court held (p. 14) that, inasmuch as it was shown that the aliens involved had been admitted by the Department officials under bond, it was impossible to take the view that such aliens had been brought to the United States "in violation of laws," and that therefore no fines could lawfully be imposed.

In *Lloyd Sabaudo* v. *Elting,* 45 Fed. (2d) 405, 409, the Circuit Court of Appeals for the Second Circuit held that the Secretary of Labor had miscontrued Section 9 of the

Immigration Act of 1917 (8 U. S. C. A., Section 145) and that the two fines involved would have to be refunded, because the aliens on whose account such fines were assessed, although they were afflicted with a loathsome contagious disease at the time of arrival, and had been allowed medical treatment under Section 22 of said Act (8 U. S. C. A., Sec. 159), and upon being cured had been admitted, pointing out that *admission did away with the evident purpose of the statute to assess fines as a preventive of the hardships of deportation,* and alluding explicitly to the manner in which Section 9 (like the section involved in the case at bar) linked absolutely together the part of the penalty consisting of an outright fine and the part consisting of passage money.

In *North German Lloyd* v. *Elting,* 48 Fed. (2nd) 547, the Circuit Court of Appeals for the Second Circuit suggests (p. 549) that:

> "If the Secretary had exercised his discretion in favor of admitting the aliens, it may be that the vessel owner who brought them would incur no penalty."

Citing the Norddeutscher and Lloyd Sabaudo cases, *supra.* And the following is taken from the latest decision of that court on this subject—*Compagnie Generale Transatlantique* v. *United States,* 51 Fed. (2d) 1053, 1055:

> "A strong reason for holding that a fine should not be imposed for bringing to the United States an alien who, though excludable under the statute, is temporarily admitted, is because the portions of the fine, namely the $200 and the return passage money, are, as Judge Patterson said in *Lloyd Sabaudo Societa* v. *Elting* (D. C.), 45 Fed. (2d) at page 409, indivisible. The carrier is required to pay the return purchase money to the collector in order to insure the alien against having to pay it and Section 9 provides that it shall be "delivered by the Collector of customs to the

alien on whose account assessed" in aid of that object. *It is impossible to suppose that a carrier is required to pay the return passage money for the benefit of an alien who is not excluded. Because the Department recognized the absurdity of such a supposition, it repaid the return purchase money deposited by the plaintiffs in this case.*

"In *North German Lloyd* v. *Elting*, 48 F. (2d) 547, where aliens liable to exclusion because of physical disability were in fact excluded, we held that a fine was properly imposed for bringing them. While we did not decide that it might not have been imposed, if the aliens had been admitted under the discretion vested in the Secretary of Labor, we cited *Lloyd Sabaudo Societa, etc.* v. *Elting* (D. C.), 45 F. (2nd) 405, and *Norddeutscher Lloyd* v. *United States* (C. C. A.), 213 Fed. 10, *in support of the conclusion that the carrier would incur no penalty under such circumstances.*" (Italics volunteered.)

It will be recalled that Section 16, like other sections of the law, indissolubly links together the provisions regarding the thousand dollar fine and those regarding passage money; and that in the case at bar, just as in that from which the above quotation is taken, the *Department recognized the absurdity of supposing that a carrier is required to pay the return passage money for the benefit of an alien who is not excluded.*

Point D. The fine against the petitioner did not accrue when the Secretary of Labor, in his discretion, authorized admission of the alien regardless of his having no immigration visa or re-entry permit.

The court below has taken in its most literal sense the language of Section 13 (*f*) of the Immigration Act of 1924, which provides:

(*f*) Nothing in this section shall authorize the remission or refunding of a fine, liability to which has *accrued* under Section 16. (Italics volunteered.)

Inasmuch as Section 13 does not authorize the imposition of any penalties, but deals exclusively in paragraphs (*a*) to (*e*) with exclusion or admission of immigrants of various classes, it is apparent that the word "accrued" must have some legal meaning. The entire sub-section (*f*) sheds no light upon itself, and we must look elsewhere for enlightenment as to when an immigration fine under Section 16 "accrues." It seems contrary to the dictates of reason to hold that the Secretary of Labor may, on the one hand, exercise statutory discretion under Section 13 (*b*) by readmission of the returning resident alien, and, on the other hand, say that he is inhibited by Section 13 (*f*) from relieving the transportation line from penalization for bringing the alien within his jurisdiction.

The word "accrued" is not used in connection with any of the fine provisions of the immigration laws and its meaning should be interpreted in the light of the general purposes of the statute and of its other provisions. (*Reading Company* v. *Koons*, 271 U. S. 58, 62; 70 L. Ed. 835, 837.) The general purpose of the statute has been set forth in detail under Point B of this brief, namely: the adoption of measures calculated to avoid the hardships of deportation by keeping inadmissible aliens from being brought to our shores. As Philip O'Reilly was found admissible and was admitted, the objective of the statute in his case was fully accomplished and no penalty "accrued." This conclusion is supported by the definition of "accrued" as "became due" (*United States* v. *Woodward*, 256 U. S. 632, 635; 65 L. Ed. 1131, 1135).

It appears inconceivable that a penalty can be said to have "accrued" at all where a discretionary right has been

favorably exercised, and Section 13 (*f*) is consistent with paragraphs (*a*), (*c*), and (*e*) of Section 13, all of which provide for exclusion, but, unless liberally construed, is in harsh conflict with the discretionary powers granted to the Secretary of Labor under paragraphs (*b*) and (*d*), at least where those powers are exercised favorably by admission of the alien.

Furthermore, an utter absurdity is created if a narrow meaning is applied to Section 13 (*f*), as it would mean that a transportation line should be penalized for bringing a returning resident alien with a re-entry permit issued under the provisions of Section 10 of the Act, and which the Secretary of Labor, in the exercise of his discretionary power, has by regulation based on Section 13 (*b*) made the equivalent of a non-quota immigration visa. As the same Section 13 (*b*) opens the way for readmission of returning resident aliens who have no visas, the existence of the absurdity is made apparent.

Point E. Section 13 (f) of the Immigration Act of 1924 does not establish a different principle than that existing under former statutes providing for similar fines in substantially the same language as that of Section 16 of the Immigration Act of 1924.

The court below (R. 34) expresses the view that its previous decisions, there cited, that the admission of an alien tolls the fine, are inapplicable here because of Section 13 (*f*), discussed in Point D, *supra*. The court says (R. 34) "That may well be true when the statute does not say otherwise, but not here." The fine provisions of the Immigration Act of 1924 in relation to passengers are all contained in Section 16, and the language thereof follows the language used in the Immigration Act of 1917 (8 U. S. C. A., Sec. 145) and that of the Quota Act of 1921-22 (42 Stat. 540) and it was invariably held that in the application of those fine provi-

sions, the admission of the alien tolled the fine. It is not to be presumed that the Secretary of Labor commits an unlawful act in the admission of the alien; hence it appears obvious that when the alien has been found admissible and has been admitted, there can have been no unlawfulness in bringing him to a place where such admission could occur. If the alien is excluded and deported, that is a different matter, as the plainly-stated object of the Act of 1924 is to alleviate the hardships of deportation and the deportee has the right to have his passage refunded, the transportation line being also liable to a fine of $1,000 for transporting an alien whose inadmissibility has been established by the Secretary of Labor, who is the final authority on that point.

A sensible construction of Section 13 (*f*) is that it forbids the Secretary of Labor to remit fines under Section 16 of the Act where the exceptions provided in paragraphs (*b*) and (*d*) have not been exercised in favor of the admission of the alien having no visa or an improper form of visa, as the case may be.

This point should be considered in its relationship to Point D, *supra*, and the authorities there cited.

Point F. The Secretary of Labor acted arbitrarily and unlawfully in imposing the fine which the petitioner seeks to recover.

While the findings of the Secretary of Labor as to the facts constituting supposed ground for penalization has been held to be final and not subject to review by the courts, the action of the Secretary is subject to judicial review to the extent of determining that he has not acted within the statutory authority conferred upon him (*Lloyd Sabaudo* v. *Elting*, 77 L. Ed., 184, 188).

In the case at bar there is no dispute as to the matters of fact, either concerning the transportation of the alien

Philip O'Reilly by the petitioner, the fact that he had no visa or re-entry permit, or the fact that he was admitted by the Secretary of Labor as a returning alien resident under the authority conferred by Section 13 (*b*) of the Immigration Act of 1924.

The gist of the proposition is that the Secretary of Labor arbitrarily held that the fine "accrued" regardless of the existence of the discretionary right to admit the alien and the exercise of such right by admitting him; also that he arbitrarily divided the penalty by imposing a part and remitting a part, while the petitioner contends that the penalty is one and indivisible; further, that the action of the Secretary of Labor in imposing the penalty amounts to penalization of the petitioner because the alien Philip O'Reilly had no re-entry permit, which is by statute (Immigration Act of 1924, sec. 10) limited to establishment that the alien holder is returning from a temporary visit abroad. Each of these propositions involves statutory construction and the petitioner contends that, as a matter of law, the Secretary of Labor misconstrued the penal provisions of the statute and inflicted a confiscatory penalty in disregard of the well-known principle that penal statutes must be strictly construed against the sovereign.

Last Point.

The petition for writ of certiorari should be granted.

Respectfully submitted,

ROGER O'DONNELL,
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WILLIAM J. PETERS,
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Of Counsel.

August 12, 1933.

APPENDIX.

Immigration Act of 1924, 8 U. S. C., Sec. 145.

SEC. 13. (*b*) In such class of cases and under such conditions as may be by regulations prescribed, immigrants who have been legally admitted to the United States and who depart therefrom temporarily may be admitted to the United States without being required to obtain an immigration visa.

SEC. 13. (*d*) The Secretary of Labor may admit to the United States any otherwise admissible immigrant not admissible under classes (2) or (3) of subd. (*a*) of this section if satisfied that such inadmissibility was not known to and could not have been ascertained by the exercise of reasonable diligence by such immigrant prior to the departure of the vessel from the last port outside of the United States

* * *.

SEC. 13. (*f*) Nothing in this section shall authorize the remission or refund of a fine liability to which has accrued under Section 16.

SEC. 16. (*a*) It shall be unlawful for any person, including any transportation company, or the owner, master, agent, charterer, or consignee of any vessel, to bring to the United States by water from any place outside thereof (other than foreign contiguous territory) (1) any immigrant who does not have an unexpired immigration visa, or (2) any quota immigrant having an immigration visa the visa in which specifies him as a non-quota immigrant.

(*b*) If it appears to the satisfaction of the Secretary of Labor that any immigrant has been so brought, such person or transportation company, or the master, agent, owner, charterer, or consignee of any such vessel, shall pay to the collector of customs of the customs district in which the port of arrival is located the sum of $1,000 for each immigrant so brought, and in addition a sum equal to that paid by such immigrant for his transportation from the initial point of departure, indicated in his ticket, to the port of

arrival, such latter sum to be delivered by the collector of customs to the immigrant on whose account assessed. No vessel shall be granted clearance pending the determination of the liability to the payment of such sums, or while such sums remain unpaid, except that clearance may be granted prior to the determination of such question upon the deposit of an amount sufficient to cover such sums, or of a bond with sufficient surety to secure the payment thereof approved by the collector of customs.

(*c*) Such sums shall not be remitted or refunded, unless it appears to the satisfaction of the Secretary of Labor that such person, and the owner, master, agent, charterer and consignee of the vessel, prior to the departure of the vessel from the last port outside the United States, did not know, and could not have ascertained by the exercise of reasonable diligence (1) that the individual transported was an immigrant, if the fine was imposed for bringing an immigrant without an unexpired immigration visa, or (2) that the individual transported was a quota immigrant, if the fine was imposed for bringing a quota immigrant the visa in whose immigration visa specified him as being a nonquota immigrant.

In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 343

HAMBURG-AMERICAN LINE, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

The decision of the court below appears to be in direct conflict with the decision of the Circuit Court of Appeals for the Ninth Circuit in *Rederiaktiebolaget Nordstjernen* v. *United States,* 61 F. (2d) 808, where a contrary result was reached on substantially identical facts. While we regard the decision below as correct, we submit that the conflict calls for an authoritative ruling by this Court, and consequently we do not oppose the granting of the writ.

J. CRAWFORD BIGGS,
Solicitor General.

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U. S. GOVERNMENT PRINTING OFFICE: 1933

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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 343

HAMBURG-AMERICAN LINE, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The judgment of the District Court was entered without an opinion (R. 13–14). The opinion of the Circuit Court of Appeals (R. 17–21) is reported in 65 F. (2d) 369.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered May 15, 1933. (R. 21–22.) The petition for a writ of certiorari was filed August 14, 1933, and was granted October 9, 1933. (R. 23.) The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a fine may be imposed upon a steamship company, under Section 16 of the Immigration Act of 1924, for bringing to the United States an alien who had previously been lawfully admitted to the United States and was returning from a temporary visit abroad but who possessed neither an immigration visa nor a reentry permit in lieu thereof, the Secretary of Labor, notwithstanding this fact, having permitted the alien to enter.

STATUTES AND REGULATIONS INVOLVED

The applicable portions of the statutes and regulations involved are set forth in the Appendix, *infra,* pp. 21–26.

STATEMENT

The petitioner, alleging three causes of action, brought suit in the District Court for the Southern District of New York to recover three fines imposed upon it by the Secretary of Labor. The second and third causes of action were decided in favor of the petitioner and have no relation to the instant case. The first cause of action arose out of the imposition, by the Secretary of Labor, of a fine under Section 16 of the Immigration Act of 1924, for bringing to the United States an immigrant who possessed neither an immigration visa nor a reentry permit. The case was submitted to the District Court upon the petitioner's motion for judgment on the pleadings. (R. 12–13.) The pleadings disclose that the following facts were undisputed (R. 2–4, 10):

On October 22, 1928, the petitioner, a foreign corporation, brought to the United States in its steamship *Deutschland* an alien named Philip O'Reilly (R. 2). The alien had left the United States on or about June 18, 1928, and was returning to his residence in the United States after a temporary visit abroad (R. 3). Upon his arrival in the United States the alien was ordered excluded and deported as a nonquota immigrant not in possession of any immigration visa (R. 2). The petitioner, who was advised that the facts appeared to warrant the imposition of a fine of $1,000, together with $140 for the return of the alien's passage money, filed a protest with the Secretary of Labor and submitted evidence to show that this fine should not be imposed (R. 2). On examination, the alien stated that he had forgotten to obtain a reentry permit (R. 3). Thereafter, the Secretary of Labor admitted the alien, but imposed a fine of $1,000 upon the petitioner for having brought to the United States an alien not in possession of an immigration visa or reentry permit (R. 3). The fine of $140 representing the passage money paid by the alien was not exacted (R. 3). The petitioner paid the fine of $1,000, under protest, to the Collector of Customs at the Port of New York (R. 3).

The District Court gave judgment for the United States on the pleadings (R. 13–14). The Circuit Court of Appeals affirmed (R. 22).

SUMMARY OF ARGUMENT

I

Section 16 of the Immigration Act of 1924 directs the imposition of a fine upon a carrier who brings to the United States an immigrant not in possession of an unexpired immigration visa. Since the alien O'Reilly was beyond question an immigrant within the meaning of the Act, the fine was properly imposed.

The Circuit Court of Appeals in *Rederiaktiebolaget Nordstjernen* v. *United States,* 61 F. (2d) 808, reached the opposite conclusion on the ground that a returning resident alien is not required to have a visa, but only a reentry permit, and the Act does not penalize a carrier for bringing in an alien who has no reentry permit. We submit that this decision is erroneous. Generally speaking, every immigrant is required to have an immigration visa. While a returning resident may present a reentry permit in lieu of a visa, he must be in possession of either one or the other. Consequently, if he has no permit he must present a visa, and if he has neither the carrier must be fined for bringing to the country an immigrant not in possession of an immigration visa.

II

Had the alien been excluded, as he might well have been (*United States ex rel. Polymeris* v. *Trudell,* 284 U.S. 279), the petitioner would clearly have been subject to a fine. The fact that he was

admitted, apparently under some discretionary authority residing in the Secretary of Labor, does not excuse the carrier. The fine accrued when the alien was brought in, or, at the latest, when he was ordered excluded and deported by the immigration inspectors, and the Secretary was without power to remit the fine unless it appeared that the carrier did not know and could not have ascertained that the alien was an immigrant. There is no suggestion that the petitioner was ignorant of that fact. Moreover, Section 13 (f) of the 1924 Act expressly declares that admission of an alien who is subject to exclusion shall not toll the fine. This section does not, as the petitioner contends, indicate that a fine cannot accrue if the alien is admitted, but, on the contrary, tends to show that in such cases the fine does accrue and may not be remitted. Cases cited in support of the contention that admission tolls the fine are not in point, since they involved statutes which made admissibility the test of the legality of the carrier's action and contained no provision analogous to Section 13 (f).

The argument that because the alien could be admitted in the discretion of the Secretary of Labor the carrier should not be fined for bringing him within the Secretary's jurisdiction seems to have been settled adversely to the petitioner in cases recently decided. The 1924 Act gives the carrier no greater immunity in this respect than did the statutes under consideration in those cases.

The fact that there was not imposed that portion of the fine representing the passage money paid by the immigrant does not invalidate the other part of the fine, which was properly imposed. Nor does the inclusion of the passage money as part of the fine prescribed by statute indicate that no fine should be imposed when the alien is admitted. Section 13 (f) contemplates the imposition of a fine in cases where the immigrant is admitted. The court below rightly held that it could not have been the intention of Congress to compel the carrier to refund the passage money when the alien is admitted. But even if the fine be indivisible, the carrier cannot complain because it was fined less than was required by law.

ARGUMENT

I

THE IMMIGRATION ACT OF 1924 MADE MANDATORY THE IMPOSITION OF A FINE UPON THE PETITIONER FOR BRINGING INTO THE UNITED STATES AN IMMIGRANT NOT IN POSSESSION OF EITHER AN IMMIGRATION VISA OR A REENTRY PERMIT

Section 16 of the Immigration Act of 1924 (*infra*, p. 24) provides in clear and unmistakable terms for the imposition of a fine upon a steamship company when it appears to the satisfaction of the Secretary of Labor that the company has brought into the United States an immigrant not in possession of an unexpired immigration visa. Nor may this fine be remitted or refunded unless the Secretary is satisfied that the carrier could not by

the exercise of reasonable diligence have ascertained that the person transported was an immigrant. An immigrant is defined in Section 3 of the Act (*infra*, p. 21) as "any alien departing from any place outside the United States destined for the United States," with certain exceptions not pertinent here, and in Section 4(b) (*infra*, p. 21) an alien who has previously been lawfully admitted to the United States and who is returning from a temporary visit abroad is classified as a non-quota immigrant. Since the alien O'Reilly was beyond question an immigrant within the meaning of the Act and was not in possession of an immigration visa, we submit that the imposition of the fine was plainly required by law.

In *Rederiaktiebolaget Nordstjernen* v. *United States*, 61 F. (2d) 808 (C.C.A. 9th), it was held on facts substantially identical with those involved here that a returning alien is not required to have an immigration visa, but only a reentry permit, and that inasmuch as the Act does not penalize a carrier for bringing in a returning alien not in possession of a permit, the fine was improperly imposed. We submit that this decision is clearly erroneous. Section 13(a) of the Act provides that no immigrant shall be admitted to the United States unless he is in possession of an unexpired immigration visa. The only exception to this requirement is found in subdivision (b) of the same section, which states that "in such classes of cases and

under such conditions as may be by regulations prescribed" immigrants who have been previously admitted and who depart temporarily may be readmitted without presenting immigration visas. In enacting this subdivision Congress evidently had in mind, among other things, the provisions of Section 10 (*infra*, p. 22) authorizing the issuance of a reentry permit to an alien resident contemplating a temporary visit abroad, and intended that in certain cases to be specified in the regulations a returning alien should be permitted to present a reentry permit in lieu of an immigration visa.

Section 10 is, however, permissive rather than mandatory and was designed to afford the alien resident a convenient means of identifying himself as such and to save him the trouble and delay incident to the procuring of an immigration visa from a consulate abroad.[1] Taken by itself, it does not

[1] The purpose of a reentry permit was explained in House Report No. 350, 68th Cong., 1st Sess., p. 18, as follows:

"Provision is made for the issuance by the Commissioner General of Immigration of permits to aliens permanently domiciled in the United States who desire to go abroad and return after temporary absence. The permit to reenter may be issued upon application by the alien with payment of fee of $6; it will be valid for six months with privilege of renewal; will identify the alien; but there will be no obligation upon the alien to obtain or carry it. It will be of value only as evidence that the alien to whom it is issued is returning from a temporary visit abroad. This provision is made solely for the convenience of the alien."

In a bulletin entitled *General Information Concerning United States Immigration Laws*, published by the Depart-

modify in any way the general rule laid down in Section 13 (a) that every immigrant must have an immigration visa in order to be admitted. The sole statutory provision relaxing this rule appears in Section 13 (b), and the regulations promulgated pursuant to that section (*infra*, pp. 25–26) specify three classes of immigrants who may be admitted without presenting immigration visas: (1) alien residents returning from a temporary visit of not more than six months to certain places in the northern half of the western hemisphere; (2) alien residents returning from a temporary visit to any other foreign country who are in possession of a permit to reenter issued in accordance with Section 10 of the Act; and (3) children born subsequent to the issuance of an immigration visa to the accompanying parent. See also Executive Order No. 4813 of February 21, 1928 (*infra*, p. 26).

It is clear, therefore, that under the Act and the regulations every immigrant must be in possession of an immigration visa unless he can bring himself within one of the three categories mentioned above. There is no suggestion that O'Reilly came from one of those places as to which neither a visa nor a permit is required. It is clearly to be inferred that he was returning from some "other

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ment of Labor, May 1, 1933, it is stated (p. 8) that possession by an alien of a reentry permit "absolves him from obtaining an immigration visa for the return journey to the United States."

foreign country," probably Ireland. In so far as is pertinent here, the strict requirement that an immigration visa be presented is waived only in the event the alien is able to display a reentry permit. Since O'Reilly had neither a visa nor a permit, the fact that he might have obtained a permit and failed to do so is of no significance with respect either to his admissibility or to the liability of the petitioner to pay a fine.

The fine was imposed, not for bringing in an alien lacking a permit to reenter, but for bringing in an alien not in possession of an immigration visa. Section 16, providing for the imposition of fines upon steamship companies, says nothing as to reentry permits. Indeed, it was not necessary that anything should be said about such permits, for it was the manifest intention of Congress that a fine should be imposed only in cases where the alien is required by the Act or the regulations lawfully promulgated under the Act to be in possession of an immigration visa. If O'Reilly had had a permit he would not have been required to present also a visa, and consequently the petitioner could not have been fined for bringing him in. Since he had no permit, he was required to have a visa, and for bringing him in without a visa the petitioner was, we submit, properly fined.

It is not perceived in what manner the Circuit Court of Appeals for the Ninth Circuit in the *Rederiaktiebolaget Nordstjernen* case disposed of

the regulations referred to above. It may well be that the court did not examine the pertinent regulations, for it refers to the regulations of July 1, 1925, as being in force, whereas the regulations of March 1, 1927, should have been applied. See *United States* v. *Day,* 21 F. (2d) 852 (S.D.N.Y.). In any event, the reasoning of that court, if carried to its logical conclusion, would mean that a carrier could not be fined for bringing to the United States a returning alien resident having neither a permit nor a visa even though the alien was excluded and deported. We submit that this erroneous interpretation of the Act and the regulations was properly rejected by the court below.

II

THE LEGALITY OF THE IMPOSITION OF THE FINE IS NOT AFFECTED EITHER BY THE ULTIMATE ADMISSION OF THE IMMIGRANT OR BY THE REMISSION OF A PART OF THE FINE EQUIVALENT TO THE AMOUNT PAID BY THE IMMIGRANT FOR HIS PASSAGE TO THE UNITED STATES

The petitioner admittedly brought to the United States an alien returning from a temporary visit abroad and having in his possession neither an immigration visa nor a reentry permit in lieu thereof. In these circumstances the alien might properly have been excluded. *United States ex rel. Polymeris* v. *Trudell,* 284 U.S. 279. See Immigration Rules of March 1, 1927, Rule 3, Subdiv. I, Par. 2, *infra,* p. 26. Had the Secretary of Labor ordered him excluded and deported and fined the petitioner

for its obvious violation of the law, there can be no doubt that the fine would have been properly imposed. See *Elting* v. *North German Lloyd,* 287 U.S. 324; *Lloyd Sabaudo Societa* v. *Elting,* 287 U.S. 329

The petitioner insists, however, that because the alien was unconditionally admitted by the Secretary of Labor it was not subject to a fine. This contention, we submit, fails to give effect to the plain language of the Act. Section 16, as has been observed, imposes a fine upon any carrier who brings to this country an immigrant not in possession of an immigration visa. As has been shown in Point I, *supra,* such a visa was required of the immigrant here. Consequently, at the moment when the petitioner brought O'Reilly into the United States without a visa, or a permit in lieu thereof, it violated the Immigration Act of 1924, and liability to fine accrued. See *Elting* v. *North German Lloyd,* 287 U.S. 324, *supra,* p. 328. There remained only the possibility that the Secretary of Labor might exercise some discretion vested in him and remit the fine. But his discretion in this respect is strictly limited by the Act itself. Under subdivision (c) of Section 16 he is without authority to remit or refund the fine unless it appears to his satisfaction that the carrier could not, by the exercise of reasonable diligence, have ascertained that the person transported was an immigrant. Since it was perfectly apparent that the alien here was an immi-

grant, and the petitioner has not even suggested that it was ignorant of the fact, much less that it could not have ascertained it, the Secretary had no authority to remit the fine.

Any doubt that might exist as to the correctness of this interpretation of the statute is dispelled by Section 13 (f), which provides that nothing in Section 13 shall authorize the remission or refunding of a fine, liability to which has accrued under Section 16. Admittedly, the alien O'Reilly came within none of the exceptions specified in the regulations promulgated under Section 13 (b) which would have authorized his admission without an immigration visa. It is said that he was admitted by the Secretary of Labor under discretion vested in him by Section 13 (b). This may well be so, although the record fails to disclose under what authority the Secretary purported to act, and it is to be observed that the rules adopted pursuant to that section make no mention of such discretionary power.[2]

[2] Rule 3, Subdivision I, Paragraph 5 of the Immigration Rules of March 1, 1927, provides that—

"Where an immigrant claiming a nonquota status fails to satisfactorily establish such status in the manner required by this subdivision, he shall be held for examination in relation thereto by a board of special inquiry."

The board of special inquiry referred to in this paragraph is evidently a board created pursuant to Section 17 of the Immigration Act of February 5, 1917, c. 29, 39 Stat. 874, 887, which provides for appeals from decisions of such boards to the Secretary of Labor. It was apparently through this procedure that the alien was admitted in the instant case. (R. 3.)

It is intimated by the court below (R. 20) that possibly the immigrant was not lawfully admitted. If that were so, the illegal admission could, of course, lend no strength to the petitioner's position; there would then be no doubt as to the fine having been properly imposed. Assuming, however, that the Secretary did possess discretionary power to admit the alien, it is apparent that such power was derived from Section 13 (b), since there is no other provision in the statute upon which the power could rest. Consequently, Section 13 (f) is applicable and precludes remission of the fine.

In its brief in support of the petition for a writ of certiorari (pp. 16–18) the petitioner contends that the fine never accrued, within the meaning of Section 13 (f), because of the fact that the alien was ultimately admitted. As stated above, it is our position that the fine accrued when the alien was brought into the country, or, at the latest, when he was ordered excluded and deported by the immigration inspectors as an immigrant not in possession of a visa. (R. 2.) Subsequent proceedings could bear only upon the right of the petitioner to secure remission of the fine. Subdivision (f) obviously has reference to the other provisions of Section 13 authorizing admission of an alien who lacks the formal documents usually required. It contemplates that in some instances liability to fine will accrue under Section 16 in spite of the fact that the alien is ultimately admitted, and declares,

in effect, that admission shall not carry with it remission of a fine thus accrued. We submit, therefore, that subdivision (f) does, contrary to the petitioner's contention, have a bearing on the interpretation of Section 16, and that it indicates that admission of the alien under the discretionary authority conferred on the Secretary by other subdivisions of Section 13 is of no significance with respect to accrual of a fine. Furthermore, it would seem to have been expressly designed to prohibit remission of fines in cases in which such discretionary power has been exercised.

As we construe the statute, there is no inconsistency in holding that a fine is properly imposed when a resident alien who has neither an immigration visa nor a reentry permit is admitted, although no fine is imposed when the alien is in possession of a reentry permit. True, the authority to admit an alien who presents a permit in lieu of a visa is found in Section 13, and accordingly the petitioner contends that on the Government's theory subdivision (f) of that section would necessarily preclude remission of the fine in such cases. This argument overlooks the fact that subdivision (f) refers only to cases in which a fine has accrued under Section 16. There is ample justification for saying that when an alien is in possession of a reentry permit, although he has no visa, the carrier does not violate the law by bringing him in, because the Act when read as a whole discloses an intention on the part

of Congress to sanction the acceptance of a permit in lieu of a visa as *prima facie* evidence of the right to admission as a nonquota immigrant. On the other hand, there seems to be nothing in the Act indicating that Congress contemplated that admission of an alien by virtue of the Secretary's discretionary power would excuse the carrier when the alien had neither of the formal documents required. The manifest purpose of the Act was to compel immigrants to equip themselves with proper evidence of their admissibility before applying at a United States port for admission, largely in order to obviate the disappointment and hardship incident to exclusion upon completion of the journey. Section 16 was designed to implement this purpose by forcing carriers to refuse transportation to immigrants who lack the necessary documents. The carrier's offense is not mitigated by admission of the alien in the Secretary's discretion. That is a matter which concerns the alien alone. Moreover, admission of an alien who presents a reentry permit is not a matter of discretion in the same sense that admission in the absence of either a visa or a permit is discretionary. In so far as the quota requirements are concerned, the effect of a reentry permit appears to be no different from that of a nonquota visa; both are merely *prima facie* evidence of the alien's nonquota status, and in any case admissibility can be finally determined only when the alien

presents himself at a United States port. We submit, therefore, that there is no analogy between the instant case and a case in which the alien presents an unexpired reentry permit, and that the fact that no fine accrues in the latter case has no bearing on the question whether a fine accrued here.

The petitioner cites *Norddeutscher Lloyd* v. *United States,* 213 Fed. 10 (C.C.A. 2d); *Lloyd Sabaudo Societa* v. *Elting,* 45 F. (2d) 405 (S.D. N.Y.); *North German Lloyd* v. *Elting,* 48 F. (2d) 547 (C.C.A. 2d); and *Compagnie Generale Transatlantique* v. *United States,* 51 F. (2d) 1053 (C.C.A. 2d), as supporting its contention that admission of the alien tolls the fine. The statutes under consideration in those cases seem to make inadmissibility the occasion for imposing the fine, whereas under the Immigration Act of 1924 the fine is imposed for bringing into the United States an immigrant not in possession of a proper visa. In any event, whether those decisions correctly state the law need not be considered, for the statutes there involved contain no provision analogous to subdivision (f) of Section 13 of the 1924 Act. The court below said with respect to those cases (R. 20):

> Thus our decisions are inapplicable, which have intimated, if they did not decide, that in other situations the admission of the alien tolls the fine. * * * That may well be true when the statute does not say otherwise, but not here.

The petitioner also contends that since the alien could be admitted in the discretion of the Secretary of Labor it should not be fined for bringing him here in order that the discretion of the Secretary might be invoked. It seems to have been settled, however, that even under the Immigration Act of 1917 and the Quota Act of 1921 the carrier could not excuse its action on this ground. *Elting* v. *North German Lloyd,* 287 U.S. 324, 327, 328; *North German Lloyd* v. *Elting,* 48 F. (2d) 547, *supra; Compagnie Francaise de Navigation a Vapeur* v. *Elting,* 66 F. (2d) 536 (C.C.A. 2d), certiorari denied November 13, 1933, No. 510, October Term, 1933; *Transatlantica Italiana* v. *Elting,* 66 F. (2d) 542 (C.C.A. 2d), certiorari denied November 13, 1933, No. 497, October Term, 1933; *Cosulich Societa Triestina di Navigazione* v. *Elting,* 66 F. (2d) 534 (C.C.A. 2d). See also *Lamport & Holt, Ltd.* v. *Elting.* 64 F. (2d) 93 (C.C.A. 2d). The Immigration Act of 1924 certainly gives the carrier no greater immunity in this respect.

It is further suggested that the fine imposed upon the petitioner did not conform to the statute because an amount representing the passage money paid by the immigrant was remitted, and reference is made to certain decisions in which it was said that the requirement that the carrier refund the fare tends to show that no fine was intended to be imposed when the alien is admitted. *Norddeutscher Lloyd* v. *United States,* 213 Fed. 10, *supra;*

Lloyd Sabaudo Societa v. *Elting,* 45 F. (2d) 405, *supra; North German Lloyd* v. *Elting,* 48 F. (2d) 547, *supra; Compagnie Generale Transatlantique* v. *United States,* 51 F. (2d) 1053, *supra.* Undoubtedly in the majority of cases involving the imposition of fines under Section 16 the immigrant who lacks a proper visa is excluded and deported. As has already been observed, however, Section 13(f) contemplates that in some instances the alien will be admitted despite his failure to comply with the formal requirements, and declares that in such cases the fine shall not abate. The inference sought to be drawn from the inclusion of the passage money as part of the fine cannot prevail against the express provisions of 13(f). It becomes necessary, therefore, to choose between regarding the fine as divisible and levying the full amount even when the immigrant has been permitted to enter. The court below said (R. 21):

> As it is incredible that Congress should have intended to impose the return passage money when the alien stopped here, we choose the alternative.

We submit that this is a reasonable and permissible interpretation of the statute. If, on the other hand, the fine must necessarily be considered indivisible, its imposition would still be mandatory, and the petitioner cannot complain because the Secretary exacted an amount less than that required by law.

CONCLUSION

The decision of the court below should be affirmed.

Respectfully submitted.

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DECEMBER 1933.

APPENDIX

The Immigration Act of 1924, c. 190, 43 Stat. 153, 154, 155, 158, 161, 162, 163 (U.S.C., Title 8, Secs. 203, 204, 210, 213, 216) provides in part:

DEFINITION OF "IMMIGRANT"

SEC. 3. When used in this Act the term "immigrant" means any alien departing from any place outside the United States destined for the United States, except (1) a government official, his family, attendants, servants, and employees, (2) an alien visiting the United States temporarily as a tourist or temporarily for business or pleasure, (3) an alien in continuous transit through the United States, (4) an alien lawfully admitted to the United States who later goes in transit from one part of the United States to another through foreign contiguous territory, (5) a bona fide alien seaman serving as such on a vessel arriving at a port of the United States and seeking to enter temporarily the United States solely in the pursuit of his calling as a seaman, and (6) an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation.

NONQUOTA IMMIGRANTS

SEC. 4. When used in this Act the term "non-quota immigrant" means—

* * * * *

(b) An immigrant previously lawfully admitted to the United States, who is returning from a temporary visit abroad;

* * * * *

PERMIT TO REENTER UNITED STATES AFTER TEMPORARY ABSENCE

Sec. 10. (a) Any alien about to depart temporarily from the United States may make application to the Commissioner General for a permit to reenter the United States, stating the length of his intended absence, and the reasons therefor. Such application shall be made under oath, and shall be in such form and contain such information as may be by regulations prescribed, and shall be accompanied by two copies of the applicant's photograph.

(b) If the Commissioner General finds that the alien has been legally admitted to the United States, and that the application is made in good faith, he shall, with the approval of the Secretary of Labor, issue the permit, specifying therein the length of time, not exceeding one year, during which it shall be valid. The permit shall be in such form as shall be by regulations prescribed and shall have permanently attached thereto the photograph of the alien to whom issued, together with such other matter as may be deemed necessary for the complete identification of the alien.

* * * * *

(f) A permit issued under this section shall have no effect under the immigration laws, except to show that the alien to whom it is issued is returning from a temporary visit abroad; but nothing in this section shall be construed as making such permit the exclusive means of establishing that the alien is so returning.

* * * * *

EXCLUSION FROM UNITED STATES

SEC. 13. (a) No immigrant shall be admitted to the United States unless he (1) has an unexpired immigration visa or was born subsequent to the issuance of the immigration visa of the accompanying parent, (2) is of the nationality specified in the visa in the immigration visa, (3) is a non-quota immigrant if specified in the visa in the immigration visa as such, and (4) is otherwise admissible under the immigration laws.

(b) In such classes of cases and under such conditions as may be by regulations prescribed immigrants who have been legally admitted to the United States and who depart therefrom temporarily may be admitted to the United States without being required to obtain an immigration visa.

* * * * *

(d) The Secretary of Labor may admit to the United States any otherwise admissible immigrant not admissible under clause (2) or (3) of subdivision (a) of this section, if satisfied that such inadmissibility was not known to, and could not have been ascertained by the exercise of reasonable diligence by, such immigrant prior to the departure of the vessel from the last port outside the United States and outside foreign contiguous territory, or, in the case of an immigrant coming from foreign contiguous territory, prior to the application of the immigrant for admission.

* * * * *

(f) Nothing in this section shall authorize the remission or refunding of a fine, liability to which has accrued under section 16.

* * * * *

PENALTY FOR ILLEGAL TRANSPORTATION

SEC. 16 (a) It shall be unlawful for any person, including any transportation company, or the owner, master, agent, charterer, or consignee of any vessel, to bring to the United States by water from any place outside thereof (other than foreign contiguous territory) (1) any immigrant who does not have an unexpired immigration visa, or (2) any quota immigrant having an immigration visa the visa in which specifies him as a nonquota immigrant.

(b) If it appears to the satisfaction of the Secretary of Labor that any immigrant has been so brought, such person, or transportation company, or the master, agent, owner, charterer, or consignee of any such vessel, shall pay to the collector of customs of the customs district in which the port of arrival is located the sum of $1,000 for each immigrant so brought, and in addition a sum equal to that paid by such immigrant for his transportation from the initial point of departure, indicated in his ticket, to the port of arrival, such latter sum to be delivered by the collector of customs to the immigrant on whose account assessed. No vessel shall be granted clearance pending the determination of the liability to the payment of such sums, or while such sums remain unpaid, except that clearance may be granted prior to the determination of such question upon the deposit of an amount sufficient to cover such sums, or of a bond with sufficient surety to secure the payment thereof approved by the collector of customs.

(c) Such sums shall not be remitted or refunded, unless it appears to the satisfaction of the Secretary of Labor that such per-

son, and the owner, master, agent, charterer, and consignee of the vessel, prior to the departure of the vessel from the last port outside the United States, did not know, and could not have ascertained by the exercise of reasonable diligence, (1) that the individual transported was an immigrant, if the fine was imposed for bringing an immigrant without an unexpired immigration visa, or (2) that the individual transported was a quota immigrant, if the fine was imposed for bringing a quota immigrant the visa in whose immigration visa specified him as being a non-quota immigrant.

The Immigration Rules of March 1, 1927, provide in part:

RULE 3.—PRIMARY INSPECTION AND DETENTION

* * * * *

Subdivision F.—Immigration and passport visas

PARAGRAPH 1.—No immigrant, whether a quota immigrant or non-quota immigrant, of any nationality shall be admitted to the United States unless such immigrant shall present to the proper immigration official, at the port of arrival, an immigration visa duly issued and authenticated by an American consular officer: *Provided,* That (a) aliens who have been previously lawfully admitted to the United States and who are returning from a temporary visit of not more than six months to Canada, Newfoundland, Bermuda, St. Pierre, Miquelon, Mexico, and islands included in the Bahama and Greater Antilles groups, or such aliens who are returning from a temporary visit to any other foreign country and who are in

possession of a permit to reenter the United States issued in accordance with the provisions of section 10 of the immigration act of 1924, and (b) children born subsequent to the issuance of an immigration visa to the accompanying parent, if otherwise admissible, shall be permitted to enter the United States without an immigration visa.

* * * * *

Subdivision I.—Nonquota status proof

PAR. 2.—An alien claiming to be nonquota immigrant by reason of having been previously lawfully admitted to the United States and to be returning from a temporary visit abroad shall be required to establish such fact to the satisfaction of the examining immigration official: *Provided,* That the presentation of a return permit duly issued to such alien pursuant to the provisions of section 10 of the immigration act of 1924 shall be deemed prima facie evidence of the fact that such alien is returning from a temporary visit abroad.

Executive Order No. 4813, of February 21, 1928, provides in part:

* * * * *

I

Immigrants: They must present immigration visas, quota or non-quota, in accordance with the requirements of the Immigration Act of 1924, except—

(1) Children born subsequent to the issuance of the immigration visa of the accompanying parent. (Sec. 13 (a) (1), Immigration Act of 1924.) Such children are not required to present documents of any kind;

(2) Aliens who have previously been admitted legally into the United States, have departed therefrom and returned within six months, not having proceeded to countries other than Canada, Newfoundland, St. Pierre, Miquelon, Bermuda, Mexico, Cuba, and other Islands included in the Bahama and Greater Antilles groups, are not required to present passports, visas, or permits to reenter.

(3) Aliens, other than those specified in (2) above, who have previously been admitted legally into the United States, have departed therefrom, and are returning from a temporary visit abroad, may present, in lieu of immigration visas, permits to reenter, issued pursuant to Section 10 of the Immigration Act of 1924.

* * * * *

U. S. GOVERNMENT PRINTING OFFICE: 1933

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SUPREME COURT OF THE UNITED STATES.

No. 343.—October Term, 1933.

Hamburg-American Line, Petitioner,
vs.
The United States of America.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[March 5, 1934.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

Philip O'Reilly, a native of Ireland and resident in the United States, returned in October, 1928, on plaintiff's vessel, from a temporary visit abroad. He had neither an unexpired immigration visa nor a permit to reenter. On his arrival, the immigration officers ordered his exclusion, but he was eventually admitted by the Secretary of Labor. Later, the Secretary of Labor fined the plaintiff in the sum of $1000 for bringing the alien to the United States. Having paid under protest, plaintiff brought this action to recover the amount of the fine upon the ground that it was illegally imposed. Judgment dismissing the complaint on the pleadings was affirmed by the Circuit Court of Appeals. 65 F. (2d) 369. This Court granted certiorari, in view of the conflicting ruling in the Ninth Circuit. *Rederiaktiebolaget Nordstjernen* v. *United States*, 61 F. (2d) 808.

The fine was imposed under Section 16 of the Immigration Act of 1924, 43 Stat. 153, 163; U. S. C. 216.[1] The provision is explicit

[1]This section provides:

"Sec. 16. (a) It shall be unlawful for any person, including any transportation company, or the owner, master, agent, charterer, or consignee of any vessel, to bring to the United States by water from any place outside thereof (other than foreign contiguous territory) (1) any immigrant who does not have an unexpired immigration visa, or (2) any quota immigrant having an immigration visa the visa in which specifies him as a non-quota immigrant.

"(b) If it appears to the satisfaction of the Secretary of Labor that any immigrant has been so brought, such person, or transportation company, or the master, agent, owner, charterer, or consignee of any such vessel, shall pay to the collector of customs of the customs district in which the port of arrival is located the sum of $1,000 for each immigrant so brought, and in addition

and the case falls directly within its terms. The section makes it unlawful for a transportation company to bring to the United States "any immigrant who does not have an unexpired visa". The alien was a "non-quota immigrant" within the definition of the statute. *Id.*, sec. 4 (b), 8 U. S. C. 204 (b). If it appears to the satisfaction of the Secretary of Labor that "any immigrant has been so brought", the transportation company must pay to the collector of customs the sum of $1000, and in addition, for the benefit of the immigrant, an amount equal to that paid for his transportation. Section 16 further provides that "such sums shall not be remitted or refunded" unless the Secretary of Labor is satisfied that it could not have been ascertained, with reasonable diligence, that the person so transported was an immigrant.

Plaintiff insists that the admission of the alien took the case out of the statute. Section 16 makes no such exception. But plaintiff invokes Section 13 of the Act of 1924 (*Id.*, 8 U. S. C. 213)[2] which,

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a sum equal to that paid by such immigrant for his transportation from the initial point of departure, indicated in his ticket, to the port of arrival, such latter sum to be delivered by the collector of customs to the immigrant on whose account assessed. . . .

"(c) Such sums shall not be remitted or refunded, unless it appears to the satisfaction of the Secretary of Labor that such person, and the owner, master, agent, charterer, and consignee of the vessel, prior to the departure of the vessel from the last port outside the United States, did not know, and could not have ascertained by the exercise of reasonable diligence, (1) that the individual transported was an immigrant, if the fine was imposed for bringing an immigrant without an unexpired immigration visa, or (2) that the individual transported was a quota immigrant, if the fine was imposed for bringing a quota immigrant the visa in whose immigration visa specified him as being a non-quota immigrant".

[2]Section 13 contains the following provisions:

"Sec. 13. (a) No immigrant shall be admitted to the United States unless he (1) has an unexpired immigration visa or was born subsequent to the issuance of the immigration visa of the accompanying parent, (2) is of the nationality specified in the visa in the immigration visa, (3) is a non-quota immigrant if specified in the visa in the immigration visa as such, and (4) is otherwise admissible under the immigration laws.

"(b) In such classes of cases and under such condtions as may be by regulations prescribed immigrants who have been legally admitted to the United States and who depart therefrom temporarily may be admitted to the United States without being required to obtain an immigration visa.

. . . . . .

"(d) The Secretary of Labor may admit to the United States any otherwise admissible immigrant not admissible under clause (2) or (3) of sub-

after providing generally in sub-division (a) for the exclusion of an immigrant who is without an unexpired immigration visa, creates a particular exception in sub-division (b) to meet the case of immigrants "who have been legally admitted to the United States and who depart therefrom temporarily". Immigrants of that sort may be admitted to the United States "without being required to obtain an immigration visa". The exception is limited. It applies only "in such classes of cases and under such conditions as may be by regulations prescribed". Acting under this authority, regulations were prescribed, which provided for the admission of such immigrants without an immigration visa, but only in case they obtained a permit to reenter under the provisions of Section 10 of the Act of 1924. *Id.*, 8 U. S. C. 210.[3] In authoriz-

division (a) of this section, if satisfied that such inadmissibility was not known to, and could not have been ascertained by the exercise of reasonable diligence by, such immigrant prior to the departure of the vessel from the last port outside the United States and outside foreign contiguous territory, or, in the case of an immigrant coming from foreign contiguous territory, prior to the application of the immigrant for admission.

. . . . . .

"(f) Nothing in this section shall authorize the remission or refunding of a fine, liability to which has accrued under section 16".

[3]Section 10 provides:

"Sec. 10. (a) Any alien about to depart temporarily from the United States may make application to the Commissioner General for a permit to reenter the United States, stating the length of his intended absence, and the reasons therefor. Such application shall be made under oath, and shall be in such form and contain such information as may be by regulations prescribed, and shall be accompanied by two copies of the applicant's photograph.

"(b) If the Commissioner General finds that the alien has been legally admitted to the United States, and that the application is made in good faith, he shall, with the approval of the Secretary of Labor, issue the permit, specifying therein the length of time, not exceeding one year, during which it shall be valid. The permit shall be in such form as shall be by regulations prescribed and shall have permanently attached thereto the photograph of the alien to whom issued, together with such other matter as may be deemed necessary for the complete identification of the alien.

"(c) On good cause shown the validity of the permit may be extended for such period or periods, not exceeding six months each, and under such conditions, as shall be by regulations prescribed.

. . . . . .

"(f) A permit issued under this section shall have no effect under the immigration laws, except to show that the alien to whom it is issued is returning from a temporary visit abroad; but nothing in this section shall be construed as making such permit the exclusive means of establishing that the alien is so returning."

ing such permits, the evident purpose of Section 10 was to enable aliens who were domiciled here and contemplated a temporary absence, to equip themselves with evidence which would identify them and facilitate their reentry. They could thus avoid the trouble and delay incident to the procuring of an immigration visa from a consulate abroad.[4] The permit is *prima facie* evidence of the fact that the alien is returning from a temporary visit. The regulations prescribed under Section 10 and Section 13 (b) except aliens who have such permits from the requirement that an immigration visa must be obtained. See Immigration Rules of March 1, 1927; Rule 3, Subdiv. F, Pars. 1, 3; Subdiv. I, Par. 2. Valid permits may be presented "in lieu of immigration visas." Executive Order No. 4813 of February 21, 1928.

These provisions should be read in connection with Section 16. And as they make the possession of a permit to reenter the equivalent of an unexpired visa, the permit should be taken to stand in place of the visa required by Section 16. In this view, where the returning alien has the prescribed permit, no fine can be imposed. This conclusion, however, gives no aid to plaintiff, as the alien in the instant case had neither visa nor permit. We are unable to agree with the contention that, where a permit will suffice, Section 16 must be regarded as having no application. As we have said, we think the proper construction of Section 16, taken with Section 13, is that the permit is merely a substitute for the visa and satisfies the requirement.

Plaintiff's argument that under Section 13 a discretion is vested in the Secretary of Labor to admit the returning alien, and that the exercise of that discretion in his favor tolls the fine, is met by the provision of sub-division (f) of Section 13: "Nothing in this section shall authorize the remission or refunding of a fine, liability to which has accrued under Section 16". Plaintiff urges that if the alien is admitted, no liability for the fine can be said to have "*accrued*". But Section 16 does not make the liability turn upon the admissibility or admission of the alien. Whatever may have been the effect of prior statutory provisions, Section 16 of the Act of 1924 makes it clear that the occasion for the fine is the bringing in of the alien without an unexpired visa or that which is prescribed as an equivalent. The question whether the

[4] See House Report No. 350, 68th Cong., 1st Sess., p. 18.

Secretary of Labor had authority to admit the alien in this instance need not be considered, for if it were assumed that the Secretary under Section 13 could admit the alien in his discretion, the fine would still stand. We agree with the Circuit Court of Appeals in the view that Section 13 (f) "preserves the fine against any discretionary admission".

Equally unavailing is the plea that the fine, as prescribed, is indivisible, and hence that no fine whatever can be imposed where the alien is admitted and the transportation company, for that reason, has not been required to return the passage money. It is true that the requirement of the payment of the passage money is for the benefit of the alien and the reason for that part of the penalty disappears on the alien's admission. But although admission in certain cases is contemplated by Section 13, liability to fine under Section 16 is none the less maintained. We think it follows that, in a case of admission, the fine of $1000 can legally be imposed without requiring payment of the passage money and the fact that the latter has not been required gives plaintiff no ground for complaint.

Plaintiff was charged with knowledge of the statute and brought in the alien in violation of its provisions. Compare *Elting* v. *North German Lloyd*, 287 U. S. 324, 328, 329. The judgment is affirmed.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.